

The Commonwealth of Massachusetts
Executive Office of Health & Human Services
Department of Mental Retardation
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January 23, 2007

Teresa Tosado-Hernandez
Social Worker
DSS/Holyoke Area Office
261 High Street
Holyoke, MA 01040

Re: _____

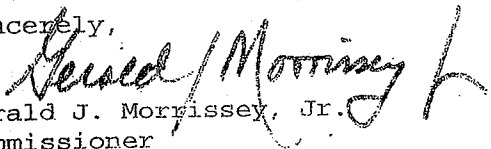
Dear Ms. Tosado-Hernandez:

Enclosed please find the recommended decision of the hearing officer in the above appeal. She held a fair hearing on the appeal of your client's eligibility determination.

The hearing officer's recommended decision made findings of fact, proposed conclusions of law and a recommended decision. After reviewing the hearing officer's recommended decision, I find that it is in accordance with the law and with DMR regulations and therefore adopt its findings of fact, conclusions of law and reasoning as my own. Your appeal is therefore denied.

You, or any person aggrieved by this decision may appeal to the Superior Court in accordance with G.L. c. 30A. The regulations governing the appeal process are 115 CMR 6.30-6.34 and 801 CMR 1.01-1.04.

Sincerely,


Gerald J. Morrissey, Jr.
Commissioner

GJM/ecw

cc: Marcia Hudgins, Hearing Officer
Terry O'Hare, Regional Director
Marianne Meacham, General Counsel
Damien Arthur, Regional Eligibility Manager
Cynthia Gagne, Assistant General Counsel
Victor Hernandez, Field Operations Senior Project Manager
File

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF MENTAL RETARDATION

In Re: Appeal of _____

This decision is issued pursuant to the regulations of the Department of Mental Retardation (DMR) (115CMR 6.30 - 6.34) and M.G.L. Chapter 30A. A hearing was held on December 14, 2006 at DMR's Central/West Regional Office in Palmer, Massachusetts.

Those present for all or part of the proceedings were:

Teresa Tosado-Hernandez	Department of Social Services (DSS) social worker
Anna E. O'Brien, M.A., L.M.H.C.	Dare Family Services (DARE) clinical supervisor
Richard P. Costigan, Psy.D.	DMR Psychologist
C. J. Gagne	Attorney for DMR

The evidence consists of documents submitted by DMR numbered D1-17 and approximately one and one-half hour of oral testimony. The Appellant offered no expert testimony.

ISSUE PRESENTED

Whether the Appellant meets the eligibility criteria for DMR supports by reason of mental retardation as set out in 115 CMR 6.03(1).

SUMMARY OF THE EVIDENCE PRESENTED

1. This Appeal is based on the Appellant's denial of eligibility for DMR services. (D3 and D7)
2. The Appellant is an 18-year-old female who resides in North Adams, MA. (D5)
3. Three evaluations of the Appellant's intellectual functioning before the age of 18 were entered into evidence. (D10, D12, D13)
4. A report of a Vineland Adaptive Behavior Scale (Vineland) completed when the Appellant was 16 years 6 months of age was entered into evidence. (D10)
5. Two Eligibility Reports were entered into evidence. (D2 and D8)

6. A Vocational Evaluation Report completed when the Appellant was 16 years of age was entered into evidence. (D11)
7. Three Individual Educational Programs (IEPs) were entered into evidence. (D14-16)
8. A Report of Achievement Testing completed when the Appellant was 17 years 2 months of age was entered into evidence. (D17)
9. In February of 1996 when the Appellant was 8 years 11 months of age, she was evaluated by Bradley J. Crenshaw, Ph.D., a Clinical Neuropsychologist employed by Baystate Medical Center. On this occasion, Dr. Crenshaw administered the Wechsler Intelligence Scale for Children-III (WISC-III) to the Appellant. On this test, the Appellant received a Verbal IQ score of 52, a Performance IQ score of 80 and a Full Scale IQ score of 64. Dr. Crenshaw noted in his report that the Appellant's profile indicates a significant discrepancy between her essentially average visual processing and her severe impairments in all aspects of her linguistic experience. He also noted that her bilingualism cannot reasonably account for such variance in skills. In the section labeled Summary and Impressions, Dr. Crenshaw stated that the Appellant's performance is consistent with a significant learning disability. He did not offer a diagnosis of mental retardation. (D13)
10. In January of 2001 when the Appellant was 13 years 10 months of age, she was evaluated by Michael Karson, Ph.D., a Diplomate in Clinical Psychology. On this occasion, Dr. Karson administered the WISC-III to the Appellant. On this test, the Appellant received a Verbal IQ score of 50, a Performance IQ score of 98 and a Full Scale IQ score of 71. He noted in his report that when one engages the Appellant verbally, she is moderately retarded, but when one engages her non-verbally, she is solidly average. He also stated that even though she may engage in some form of gainful employment, she may remain functionally retarded in verbal spheres. He concluded that the Appellant can be described as having a neurological disorder that has left her moderately retarded in verbal spheres and unimpaired in several non-verbal spheres. He did not offer a diagnosis of mental retardation. (D12)
11. In September of 2003 when the Appellant was 16 years 6 months of age, she was evaluated by Ellen Doyle, Ph.D., a Licensed Psychologist. On this occasion, Dr. Doyle administered the WISC-III to the Appellant. On this test, the Appellant received a Verbal IQ score of 56, a Performance IQ score of 95 and a Full Scale IQ score of 73. Dr. Doyle noted in her report that the difference between the Appellant's Verbal IQ/Verbal Comprehension Index (68) and her Performance IQ/Perceptual Organization Index (99) is statistically significant indicating that her ability to reason non-verbally is better than her ability to reason using words. Dr. Doyle reported that the Appellant was in the borderline range of intellectual functioning. She stated the Appellant is diagnosed with a language-based learning deficit. Dr. Doyle did not offer a diagnosis of mental retardation. (D10)

12. Dr. Doyle' report set out the results of the Vineland as completed by Sandra Richards, the Appellant's foster mother. The results were as follows: Communication Skills were low, Daily Living Skills were low and Socialization Skills were moderately low. The Appellant's Adaptive Behavior Composite was 44. Dr. Doyle stated that overall the Appellant's Adaptive Living Skills are low when compared to her peers. (D10)
13. The Appellant's three IEPs all acknowledge the Appellant's difficulty with communication, both written and oral as well as with functional academics. (D14-16)
14. In August of 2003 when the Appellant was 16 years of age, she was given a vocational evaluation using situational assessments, work samples, an interest inventory and general observation. The results of the evaluation were set out in a Vocational Evaluation Report authored by Linda Witherell, the Director of Vocational Development and Education for the Berkshire County ARC. In her report, Ms. Witherell concluded that it appears that the Appellant is capable of competitive employment, especially at the entry level, as long as the job duties are concrete and involve performances based on physical skill rather than relying on verbal (more abstract) concepts, understanding and reasoning. She stated that the best model of support for the Appellant appears to be transitional employment/supported work, leading to competitive employment. She explained that this would provide the Appellant with assistance from a job developer to among other things, help explore job possibilities and to prepare applications/resumes and any interviews that ensue. (D11)
15. The Report of Achievement Testing dated May 4, 2004 based on the results of the Woodcock-McGrew-Werder Mini-Battery of Achievement states that the Appellant's Basic Skills (a combined measure of reading, writing and mathematics skills) are in the very low range. Likewise, her Factual Knowledge is in the very low range. (D17)
16. Anna E. O'Brien testified on behalf of the Appellant. She stated that she knows the Appellant indirectly as the supervisor for the Appellant's social worker and through her mentor. She stated that she has met with the Appellant on quite a few occasions and believes that upon turning 22 the Appellant will need a great deal of support. She stated that she believes DMR is best suited to provide that support. She stated that she was aware of the DMR criteria for eligibility and does not believe that the Appellant meets the criteria on paper. She stated that the 39 point difference between the Appellant's Verbal IQ score (56) and Performance IQ score (95) on her most recent IQ test renders her quite impaired. She stated that the Appellant lives in a therapeutic foster care residence. She goes to school at the Greenhouse Program, an extended school program and works part-time at McDonalds. Ms. O'Brien stated that the Appellant has trouble with hygiene and needs reminders. She can be independent with prompting. Ms. O'Brien indicated that the Appellant

is covered under Chapter 688. She stated that the Appellant is not good at making choices; she exercises poor judgment. Ms. O'Brien stated that although on paper the Appellant does not meet the DMR criteria for eligibility, it is imperative that she receive services and believes that DMR would be the best place for her to be. Ms. O'Brien testified that the Appellant has a diagnosis of Post Traumatic Stress Disorder (PTSD).

17. Teresa Tosado Hernandez, the Appellant's DSS social worker testified on behalf of the Appellant. She stated that she met the Appellant about a year ago. She further testified that the Appellant makes very poor decisions, and her poor decision making places her at risk. Ms. Tosado Hernandez stated that the Appellant passed the MCAS with a great deal of support. She stated that the Greenhouse Program teaches the Appellant some work skills and provides her with a job coach. An application for services from Mass Rehab has been made on behalf of the Appellant.

18. Richard Costigan, Psy.D. testified as an expert for DMR. Dr. Costigan testified that the Department's definition of mentally retarded is that an individual must have significant limitations in intellectual functioning as defined as being 2 standard deviations below the mean which is approximately 70 on a standardized test taking into consideration the standard error of measurement. The individual must have significant adaptive limitations in 3 out of 7 identified areas. The limitations are designated by being in the 3rd percentile and below in comparison with the general population. The individual must also be a resident of the Commonwealth. (D1)

Dr. Costigan stated that he has experience both giving and interpreting IQ tests. Dr. Costigan explained that in general a mentally retarded individual has global developmental delays. Although there are exceptions, global delays are evidenced by a fairly flat profile on an IQ test meaning that all of the subtests gather around the area from 1-4.

Dr. Costigan explained that the Verbal Comprehension Index score takes into account the 4 subtests that most highly correlate with the verbal IQ. This score leaves out those subtests that are most vulnerable to attention and concentration. The Performance Organization Index takes into consideration the 4 subtests that are most highly correlated with nonverbal functioning. It is thought that the Index scores are more highly correlated with the person's verbal or nonverbal functioning.

Dr. Costigan explained that the Full Scale IQ is a combination of the Verbal and the Performance IQ scores. In some ways it is a summary score. It is an attempt to depict the individual's overall cognitive functioning. At times it can be a very useful number, but when there is a large discrepancy between the Verbal IQ score and the Performance IQ score it is not useful. Technical manuals for the WISC-III, the WISV-IV, the WAIS-III as well as the Stanford Benet say that when there is more than a 15-point difference between the Verbal IQ score and the Performance IQ score, the Full Scale score is thought to be meaningless. These manuals note

that in this circumstance the Full Scale IQ score should not be reported.

Dr. Costigan testified that his determination of ineligibility was based on the results of three psychological tests. The first test dated February 7, 1996 showed a Verbal IQ of 52 which is the extremely low range and a Performance IQ score of 80 which is in the low average range. Dr. Costigan testified that these scores are consistent with a verbal learning disability. He stated that most mentally retarded individuals would not score in the average range with the exception of those who have a good memory and a capacity for copying. These individuals would score higher on Arithmetic, Digit Span, Coding and Symbol Search. He testified that this is a rare exception and that most mentally retarded individuals do not score in the average range in either the verbal or the performance areas. He stated that the Appellant does not fall into this exception, and noted that on all of her tests, her verbal scores are incredibly impoverished while her non-verbal scores range from the lower end of the low average range to solidly in the average range. He stated that all three tests that he reviewed are strikingly similar. (D13)

Dr. Costigan testified relative to the Psychological Evaluation performed by Karson, Ph.D. He pointed out that there was a 48 point difference between the Verbal and the Performance IQ scores. He stated that it was striking that the Appellant's Performance IQ score went from an 80 to a 98. This could be due to her more stable living environment. Her Coding Subtest went from a 2 to a 7. (D12)

Dr. Costigan testified relative to the Psychological Assessment performed by Ellen Doyle, Ph.D. He stated the Appellant's scores on this assessment show an incredibly similar pattern. He stated that the Appellant's Perceptual Organization Index of 99 is in the 47th percentile compared to the general population. (D10)

Dr. Costigan stated that his decision in this case was based on the Appellant's cognitive functioning. He also stated that the Appellant's adaptive functioning is significantly impaired. He based this determination on two adaptive functioning evaluations. One was contained in the Psychological Evaluation dated September 16, 2003. On this assessment, the Appellant received an adaptive functioning composite of 44. DMR also completed an adaptive functioning evaluation. On this assessment - the ABAS-II, the Appellant was found to have a general adaptive composite of 57 which Dr. Costigan testified is the extremely low range. (D2 and D10)

Dr. Costigan stated that the Appellant is a young woman who has incurred an enormous amount of trauma and has a significant neurologically language based learning disability that impairs her in a number of capacities. She has a significant strength in non-verbal functioning. Those skills will help her in vocational trades. She will have challenges in the verbal domain. He concluded that she does not meet the criteria for a diagnosis of mental retardation because her non-verbal functioning is solidly in the average range. Dr. Costigan opined that the Appellant

would be able to learn things that are rote. Dr. Costigan stated that although the Appellant has poor verbal skills, her strengths in the non-verbal area enable her to see and to problem solve at a much higher level than someone with mental retardation even though she may not be able to tell you why she is doing what she is doing. He stated that he did not know why all three licensed examiners chose to report the Appellant's Full Scale IQ scores given the manuals' clear instructions not to do so with such a large discrepancy between the Verbal and the Performance IQ scores.

FINDINGS AND CONCLUSIONS

After a careful review of all of the evidence and despite her need for continuing supports, I find that the Appellant has failed to show by a preponderance of the evidence that she meets the DMR eligibility criteria. My specific reasons are as follows:

In order to be eligible for DMR supports, an individual who is 18 years of age or older must meet the three criteria set forth at 115 CMR 6.03: (a) he must be domiciled in the Commonwealth, (b) he must be a person with Mental Retardation as defined in 115 CMR 2.01¹, and (c) he must be in need of specialized supports in three or more of the following seven adaptive skill areas: communication, self-care, home living, community use, health and safety, functional academics and work. There is no dispute that the Appellant meets the first criteria and I specifically find that she meets that criterion.

By statute, M.G.L. c. 123B, section 1, a mentally retarded person "is a person who, as a result of inadequately developed or impaired intelligence, as determined by clinical authorities as described in the regulations of the department is substantially limited in his ability to learn or adapt, as judged by established standards available for the evaluation of a person's ability to function in the community." Consistent with its statutory mandate, DMR has adopted the American Association on Mental Retardation (AAMR) 1992 standards as the clinical authority to which it refers in determining whether an individual has "inadequately developed or impaired intelligence". The AAMR standards establish a three-prong test: (a) the individual must have significantly sub-average intellectual functioning defined as an IQ score of approximately 70 to 75 or below, based on assessments that includes one or more individually administered general intelligence tests, (b) related limitations in two or more of the following adaptive skill areas: communication, self care, home living, social skills, community use, self direction, health and safety, functional academics, leisure and work must exist concurrently with sub average intellectual functioning, and the individual must have manifested the criteria (a) and (b) before the age of 18.

¹ DMR changed its definition of "mental retardation" and the incorporated the definition of "significantly sub-average intellectual functioning" effective June 2, 2006. Because the Appellant's application for DMR supports was filed before June 2, 2006, the earlier standard applies.

I find that the Appellant is not "mentally retarded" as that term is used in statute and regulation for the determination of DMR supports.

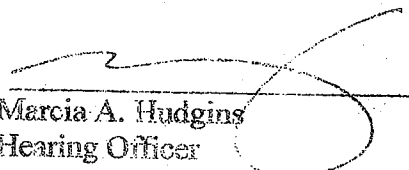
I find that the Appellant does not have significantly sub-average intellectual functioning. Although the Appellant's three Full Scale IQ scores all fall within the range of 70 to 75 or below, DMR's expert witness testified that these scores should not have been reported due to the large discrepancy between the Appellant's Verbal and Performance IQ scores. I therefore did not consider these scores when making my determination. I find that the Appellant has a language based learning disability and does not have significant global intellectual limitations, but in fact has strengths in the non-verbal area that enable her to see and to problem solve at a much higher level than someone with mental retardation. I find that her non-verbal skills are in the average range. It appears from the testing as well as from the Vocational Evaluation that the Appellant can reason and problem solve and learn from experience when presented with non-verbal tasks. I find that she is capable of competitive employment as long as the job duties are based on physical skills rather than on verbal skills.

While DMR agreed that the Appellant has multiple functional limitations and, evidence was presented relative to the those functional limitations and the need for continuing supports, I did not give consideration to such evidence in reaching my determination because I found that the weight of the evidence presented relative to the Appellant's intellectual functioning showed that the Appellant does not have significantly sub-average intellectual functioning. Because the Appellant failed to show by a preponderance of the evidence that she met the criteria of the first prong of the three pronged AAMR definition of mental retardation, I did not find it necessary to consider the Appellant's functional limitations in reaching my decision. Functional limitations can result from a variety of conditions. Unless the weight of the evidence shows that an individual has significantly sub-average intellectual functioning, it is not necessary to give consideration to such functional limitations.

APPEAL

Any person aggrieved by a final decision of the Department may appeal to the Superior Court in accordance with M.G.L. c. 30A [115 CMR 6.34(5)].

Date: December 28, 2006


Marcia A. Hudgins
Hearing Officer